No. 91-1410

In the Supreme Court of the United States

OCTOBER TERM, 1991

SAMUEL E. WALLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

LOUIS M. FISCHER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the district judge abused his discretion by not disqualifying himself under 28 U.S.C. 455(a), which requires disqualification when a judge's impartiality might reasonably be questioned.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is unpublished, but the judgment is noted at 951 F.2d 364 (Table).

JURISDICTION

The judgment of the court of appeals was entered on December 19, 1991. The petition for a writ of certiorari was filed on February 25, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a bench trial in the United States District Court for the District of Oregon, petitioner was convicted on 61 counts of structuring deposits to avoid

currency transaction reporting requirements, in violation of 31 U.S.C. 5313(a), 5324(3) and 5322, and one count of conspiring to commit those offenses, in violation of 18 U.S.C. 371. He was sentenced to 15 months in prison, to be followed by two years of supervised release. C.A. Excerpts of Record 116-118. The court of appeals affirmed. Pet. App. A1-A14.

1. Under 31 U.S.C. 5313(a) and implementing regulations, 31 C.F.R. 103.22, a domestic financial institution is required to file a currency transaction report with the Internal Revenue Service for each currency transaction that exceeds $10,000. The evidence at trial, the sufficiency of which is not in dispute, showed that between January 12, 1988, and April 25, 1988, petitioner deposited over $400,000 in 80 currency transactions, each one of which involved less than $10,000. He deposited the currency into the business and personal accounts of his co-defendant and stepfather, Gentry McKinney, as well as into his own account. Gov't C.A. Br. 12-13; Pet. 4. In so doing, petitioner structured the transactions to avoid federal reporting requirements. For example, he was involved in a scheme to add cash to McKinney's business deposits and spread some deposits over Friday, Saturday, and Sunday instead of making a large single deposit. Gov't C.A. Br. 12-14.[1]

2. The district court granted petitioner's motion to sever his trial from that of McKinney. In connection with that motion, petitioner and the government agreed that McKinney would be tried by a jury prior to petitioner's trial. Petitioner agreed to waive his

[1] The evidence also showed that petitioner structured transactions relating to his purchase of a home and to other deposits into McKinney's and his own bank accounts. Gov't C.A. Br. 18-21.

right to a jury trial and to have a bench trial using the relevant evidence from McKinney's trial, as supplemented by any evidence adduced relative to petitioner's role in the offense. C.A. Excerpts of Record 104.

The same district judge presided at both trials. After McKinney's conviction, the judge saw an FBI report that had been appended to McKinney's presentence report. The FBI report alleged that McKinney and petitioner had been involved in drug trafficking. C.A. Excerpts of Record 105-106. Based on the trial judge's review of the FBI report during McKinney's sentencing, petitioner moved for a new trial in his case. He alleged that the judge should have recused himself from this case because "his impartiality might reasonably be questioned," 28 U.S.C. 455(a), on account of his contact with the information in that report. C.A. Excerpts of Record 109.

The district court denied petitioner's motion. The judge acknowledged that he had read the FBI report alleging drug dealing by McKinney and Waller, but stated that he had disregarded references to Waller when he sentenced McKinney. C.A. Excerpts of Record 106-108. Moreover, while the judge was aware of the government's general contentions concerning the drug-related source of the currency at issue, he explained that he had either rejected or failed to recall specific allegations from the McKinney presentence report. *Id.* at 109. The court concluded that a new trial was unwarranted because (a) petitioner knew that the court had information concerning the government's "drug source" theory but did not move for recusal at the outset of the case; (b) the court did not harbor any bias or prejudice toward petitioner; and (c) the court ignored any inadmissible evidence in adjudicating petitioner's guilt. *Id.* at 110.

3. The court of appeals affirmed, reasoning that "[i]nformation obtained by a judge through judicial duties in relation to one co-defendant[] * * * cannot serve to disqualify that judge from the subsequent trial of another co-defendant." Pet. App. A4. Several factors supported the court's conclusion. First, the trial judge had read the McKinney presentence report more than five months before petitioner's bench trial and had forgotten the significance and the specific allegations of the report. *Id.* at A5. Second, a judge is presumed to ignore inadmissible evidence in deciding a case, and that presumption applied with respect to the trial judge's consideration of the McKinney presentence report. Third, because petitioner had agreed that the trial judge could consider evidence from McKinney's trial in petitioner's trial, he was aware that the judge would have access to all information from those proceedings. Thus, the FBI report in the McKinney case was not an ex parte communication that the trial judge should not have seen. *Id.* at A5-A6.

ARGUMENT

Petitioner contends that the district judge should have recused himself under 28 U.S.C. 455(a) because of his awareness of the allegations in the McKinney presentence report. Pet. 11-19. He principally contends, Pet. 15-18, that the decision below conflicts with *United States* v. *Chantal*, 902 F.2d 1018 (1st Cir. 1990), which held that a judge's acquisition of information in a prior case can be grounds for recusal under Section 455(a) if the judge's statements or actions would lead a reasonable person to question his impartiality. 902 F.2d at 1022-1024. Although *Chantal* differs in approach from the unpublished opinion in

this case,[2] see Pet. App. A5, there is no conflict between the two decisions.[3]

The judge in *Chantal* had said, during the sentencing phase of a previous prosecution, that he believed that Chantal was "an unreconstructed drug trafficker" and that the judge had "no confidence whatever that [Chantal] will change his ways in the future." 902 F.2d at 1020. When Chantal was again indicted and the case was assigned to the same judge, Chantal moved to recuse him under Section 455(a), citing the judge's remarks in the previous case. The judge denied that motion, reasoning that his prior comments arose from a judicial rather than extrajudicial source. Concluding that an appearance of bias

[2] Consistent with the decision below, other courts of appeals have held that a motion for recusal under Section 455(a) must be based on circumstances that are extrajudicial in origin. See, *e.g.*, *United States* v. *Sammons*, 918 F.2d 592, 599 (6th Cir. 1990); *McWhorter* v. *City of Birmingham*, 906 F.2d 674, 678 (11th Cir. 1990); *United States* v. *Mitchell*, 886 F.2d 667, 671 (4th Cir. 1989); *United States* v. *Merkt*, 794 F.2d 950, 960 (5th Cir. 1986), cert. denied, 480 U.S. 946 (1987). Although some courts have recognized an exception to that general rule when the moving party demonstrates pervasive bias and prejudice, *e.g.*, *McWhorter*, 906 F.2d at 678, petitioner does not allege, and there is no basis for finding, such circumstances in this case.

[3] Relying on *Roberts* v. *Bailar*, 625 F.2d 125 (6th Cir. 1980), petitioner also suggests, Pet. 16-17, that the Sixth Circuit has taken an approach that is contrary to that of the Ninth Circuit. *Bailar*, however, merely held that recusal was proper after the judge said of a defendant in a sex discrimination action, "I know [the defendant] and he is an honorable man and I know he would never intentionally discriminate against anybody." 625 F.2d at 127. The decision in *Bailar* did not address the issue presented here, and the Sixth Circuit has since made clear that a motion for recusal must be based on extrajudicial circumstances. See *Sammons*, 918 F.2d at 599.

could in some circumstances arise out of judicial proceedings, the First Circuit reversed and remanded for reconsideration of whether the trial judge's impartiality could reasonably have been questioned. 902 F.2d at 1024.

Here, by contrast, the district judge's impartiality could not reasonably be questioned, even taking into account the McKinney presentence report.[4] Unlike the judge in *Chantal*, the judge here made no remarks in petitioner's or McKinney's case that would indicate a lack of impartiality toward petitioner. Indeed, the trial judge made clear that he had disregarded allegations about petitioner in considering McKinney's presentence report and that he had either rejected or forgotten the report's specific allegations by the time of petitioner's trial five months later.[5] Finally, there is nothing in the record to rebut the presumption that the judge considered only admissible evidence in adjudicating this case or to indicate that the court was impermissibly influenced by the McKinney presentence report in finding petitioner

[4] It is well settled, and petitioner does not dispute, that a motion to recuse under Section 455(a) is to be decided by asking whether a reasonable person, after viewing all the circumstances, would question the judge's impartiality. *E.g.*, *United States* v. *Walker*, 920 F.2d 513, 517 (8th Cir. 1990); *Sammons*, 918 F.2d at 599; *McWhorter*, 906 F.2d at 678; *Chantal*, 902 F.2d at 1024.

[5] The judge was aware of the general contention that the source of the currency at issue was illegal narcotics. However, petitioner knew that the judge had learned of that theory at McKinney's sentencing and did not move for recusal at the outset of the trial. In addition, the government proffered admissible evidence advancing the "drug source" theory in petitioner's case. Thus, the court would have learned of that theory in any case.

guilty.[6] Thus, even under the reasoning of *Chantal*, the district court acted well within its discretion in rejecting petitioner's motion for a new trial, and the court of appeals properly held that, on the facts of this case, there are "no reasonable grounds for questioning [the trial judge's] impartiality."[7] Pet. App. A6.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

LOUIS M. FISCHER
Attorney

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[6] Indeed, in his brief before the court of appeals, petitioner specifically disavowed that the trial judge harbored actual bias against him. See Pet. C.A. Br. 9 n.7 ("We have not asserted below, nor do we assert here, that Judge Redden was in fact biased against Defendant * * *.").

[7] In a case decided after *Chantal*, the First Circuit rejected a claim analogous to petitioner's. In *United States* v. *Devin*, 918 F.2d 280 (1990), the defendant alleged that his trial judge was biased against him because of the court's participation in a similar and related case. The First Circuit observed that "[t]he fact that Devin's case was reminiscent of a case over which the judge had recently presided was not a disqualifying factor," even though the trial judge referred to certain of his rulings in the previous case in Devin's trial. *Id.* at 294. The court of appeals also held that Devin had erroneously relied on *Chantal* because the judge in Devin's case had not made any "regrettable" remarks about Devin in a prior trial. *Id.* at 295 n.12.